

Bullying in the Workplace		Tab 17
<p><u>Background:</u></p> <p>TCDD staff will provide information regarding how to address bullying in the workplace.</p> <p>Background documents include:</p> <ul style="list-style-type: none"> • Current law regarding bullying • HB 3226 (2015) relating to abusive conduct in the workplace • Texas Workforce System Strategic Comments 		
<p><u>Public Policy Committee</u></p> <p><u>Agenda Item 7.</u></p>	<p><u>Expected Action:</u></p> <p>The Committee will receive updates on this topic and may make recommendations for consideration by the Council.</p>	
<p><u>Council</u></p> <p><u>Agenda Item 11. C.</u></p>	<p><u>Expected Action:</u></p> <p>The Council will receive reports from the Public Policy Committee and consider any recommendations offered from the Committee.</p>	

Bullying in the Workplace

October is National Disability Employment Awareness Month. In combination with the 25th anniversary of the Americans with Disabilities Act, it provides an opportunity to address the bullying of people with disabilities in the workplace.

Current Status

- There is no federal law that explicitly defines or prohibits “bullying.”
- Current federal and state laws referencing bullying are focused on schools and children.
- Approximately 29 states, including Texas, have introduced anti-bullying in workplace bills¹, which are modeled in large part after the “Healthy Workplace Act” drafted by David Yamada² and supported by the Workplace Bullying Institute.³
- During the 84th Texas Legislature, Representative Garnet Coleman introduced House Bill 3226, modeled after the “Healthy Workplace Act.” Although it mentions people with disabilities, it does not recognize protected status groups *per se*. It was referred to the House Business and Industry Committee but did not get a hearing. A copy of the bill is attached.

Bullying is Harassment

Bullying is harassment (systematic, annoying, and continued actions which include threats and demands; creating a hostile situation by uninvited and unwelcome verbal or physical conduct).

Harassment (Title VII, Civil Rights Act of 1964; Civil Rights Act of 1991)⁴

- It is illegal to harass an applicant or employee because he has a disability, had a disability in the past, or is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he does not have such an impairment).
- Harassment can include, for example, offensive remarks about a person's disability. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.
- At work a complaint of harassment can result in anti-discrimination proceedings if (1) the person being bullied is in a protected class (which includes people with disabilities), (2) the bully is not in a protected class, and (3) a hostile work environment exists.
- The Civil Rights Act of 1991 provides for the recovery of compensatory and punitive damages for intentional violations of Title VII, the Americans with Disabilities Act, or Section 504 of the Rehabilitation Act of 1973.
- Successful suits are rare. Even when they make it to trial, they tend to be dismissed. When there is a victory, often the payment of damages is reduced.⁵

¹<http://www.workplacebullying.org/>, accessed July 7, 2015.

²Yamada DC. “Crafting a Legal Response to Workplace Bullying,” in *Employee Rights and Employment Policy Journal*, Vol. 8, p. 475, 2004.

³<http://www.workplacebullying.org/>, accessed July 15, 2015.

⁴<http://www.eeoc.gov/laws/types/disability.cfm>, accessed July 7, 2015.

⁵ Weber MC. *Disability Harassment*. New York and London: New York University Press. 2007.

Bullying and Interference, Coercion, or Intimidation (Americans with Disabilities Act; Rehabilitation Act of 1973)

- *It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter* (ADA §12203(b)).
- Two federal court decisions established that disability-based harassment is actionable under the Americans with Disabilities Act: *Fox v. General Motors* and *Flowers v. Southern Regional Physician Services Inc.* Fox made the following elements threshold criteria:
 - Complaint made by qualified individual with disability;
 - Individual subjected to unwelcome harassment;
 - Harassment based on disability;
 - Harassment severe or pervasive enough to alter the conditions of employment; and
 - Factual basis for holding the employer liable.

Bullying and Abuse (Texas Human Resources Code, Section 48.002)

Abuse is (A) the negligent or willful infliction of injury, unreasonable confinement, **intimidation**, or cruel punishment of an elderly or disabled person with resulting physical or **emotional harm or pain...**

By: Coleman

H.B. No. 3226

A BILL TO BE ENTITLED

AN ACT

relating to addressing abusive conduct in the workplace; creating a private right of action.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The heading to Subtitle A, Title 2, Labor Code, is amended to read as follows:

SUBTITLE A. EMPLOYMENT DISCRIMINATION AND ABUSIVE CONDUCT IN THE
WORKPLACE

SECTION 2. Subtitle A, Title 2, Labor Code, is amended by adding Chapter 23 to read as follows:

CHAPTER 23. ABUSIVE CONDUCT IN THE WORKPLACE

Sec. 23.001. DEFINITIONS. In this chapter:

(1) "Abusive conduct" includes an act or omission that a reasonable person would find abusive based on the severity, nature, and frequency of the conduct. The term includes:

(A) repeated verbal abuse, including the use of derogatory remarks, insults, and epithets;

(B) repeated verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature;

(C) repeated sabotage or undermining of an employee's work performance; and

(D) a single act of abusive conduct that is especially severe and egregious.

(2) "Abusive work environment" means a work

environment in which an employer or an employee, acting with intent to cause pain or distress, subjects an employee to abusive conduct that causes physical harm or psychological harm.

(3) "Adverse employment action" includes termination, demotion, unfavorable reassignment, failure to promote, disciplinary action, reduction in compensation, and constructive discharge.

(4) "Constructive discharge" occurs when:

(A) an employee reasonably believes the employee has been subjected to an abusive work environment;

(B) the employee resigns because of the abusive work environment; and

(C) the employer was aware of the abusive work environment before the employee resigns but failed to stop the abusive conduct.

(5) "Physical harm" means the impairment of a person's physical health or bodily integrity, as established by competent evidence.

(6) "Psychological harm" means the impairment of a person's mental health, as established by competent evidence.

Sec. 23.002. UNLAWFUL EMPLOYMENT PRACTICES. An employer commits an unlawful employment practice if the employer:

(1) subjects an employee, or permits another employee to subject the employee, to an abusive work environment;

(2) permits the constructive discharge of an employee;
or

(3) retaliates in any manner against an employee who,

under this chapter:

(A) opposes an unlawful employment practice;

(B) makes or files a charge;

(C) files a complaint; or

(D) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.

Sec. 23.003. EMPLOYER LIABILITY; DEFENSES. (a) An employer is liable for an unlawful employment practice under this chapter.

(b) An employer is vicariously liable for the abusive conduct of an employee.

(c) A court shall consider abusive conduct that exploits an employee's known psychological or physical illness or disability as an aggravating factor.

(d) It is a defense to liability under this section that:

(1) the employer did not take an adverse employment action against the complainant and:

(A) the employer exercised reasonable care to prevent and promptly correct abusive conduct; and

(B) the complainant unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer; or

(2) the employer took an adverse employment action against the complainant because of:

(A) the complainant's poor performance or misconduct; or

(B) the employer's economic necessity, reasonable performance evaluation of the complainant, or

reasonable investigation of the complainant's potentially illegal or unethical activity.

Sec. 23.004. EMPLOYEE LIABILITY; DEFENSE. (a) An employee is individually liable for abusive conduct under this chapter.

(b) A court shall consider abusive conduct that exploits an employee's known psychological or physical illness or disability as an aggravating factor.

(c) It is a defense to liability that the employee committed the abusive conduct at the direction of the employer under actual or implied threat of an adverse employment action.

Sec. 23.005. INJUNCTION; EQUITABLE RELIEF. (a) On finding that a respondent engaged in an unlawful employment practice or abusive conduct as alleged in a complaint, a court may:

(1) prohibit by injunction the respondent from engaging in an unlawful employment practice or abusive conduct; and

(2) order additional equitable relief as may be appropriate.

(b) Additional equitable relief may include:

(1) reinstating the complainant;

(2) removing the party that engaged in abusive conduct from the complainant's work environment;

(3) back pay;

(4) front pay;

(5) medical expenses;

(6) compensation for pain and suffering;

(7) compensation for emotional distress;

(8) punitive damages; and

1 (9) attorney's fees.

2 (c) An employer who is liable for an unlawful employment
3 practice under this chapter that does not include an adverse
4 employment action is not liable for emotional distress damages and
5 punitive damages unless the actionable conduct is extreme and
6 outrageous.

7 Sec. 23.006. PRIVATE RIGHT OF ACTION; LIMITATIONS. (a)
8 This chapter may only be enforced by a private right of action.

9 (b) An action under this chapter must be commenced not later
10 than the first anniversary of the last act that constitutes the
11 alleged unlawful employment practice or abusive conduct.

12 Sec. 23.007. EFFECT ON OTHER LEGAL RELATIONSHIPS. (a) This
13 chapter does not supersede rights and obligations provided under
14 collective bargaining laws and regulations.

15 (b) The remedies provided in this chapter are in addition to
16 any remedy provided under any other law. This chapter does not
17 relieve any person from any liability, duty, penalty, or punishment
18 provided by any other law.

19 (c) Notwithstanding Subsection (b), an employee's payments
20 of workers' compensation shall be reimbursed from compensation paid
21 under this chapter if an employee receives workers' compensation
22 under this chapter and Subtitle A, Title 5:

23 (1) for medical costs for the same injury or illness;
24 or

25 (2) in cash payments for the same period the employee
26 is not working as a result of the compensable injury or illness or
27 the unlawful employment practice or abusive conduct.

1 SECTION 3. The change in law made by this Act applies only
2 to a cause of action that accrues on or after the effective date of
3 this Act. A cause of action that accrues before the effective date
4 of this Act is governed by the law in effect immediately before that
5 date, and that law is continued in effect for that purpose.

6 SECTION 4. This Act takes effect September 1, 2015.

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Comments on The Texas Workforce System Strategic Plan FY 2016-FY 2023

Draft for Public Comment, 40 TexReg 4070, June 19, 2015

The Texas Council for Developmental Disabilities (TCDD) appreciates the opportunity to provide comments on the Texas Workforce Investment Council (Council) strategic plan which covers the next eight years. The mission of TCDD is to create change so that all people with disabilities are fully included in their communities and exercise control over their own lives.

The following comments on the plan are based on recognition of two principles: First, Texas is an “Employment First” state. Senate Bill 1226, 83rd Texas Legislature, Regular Session, 2013, established employment as the first and preferred option for working-age Texans with disabilities and the expectation that individuals with disabilities are able to meet the same employment standards, responsibilities, and expectations as other working-age adults (Texas Government Code Section 531.02448(a)). “Employment First” is an approach to facilitating the full inclusion of individuals with disabilities in the workplace. This approach states that integrated, competitive employment should be the first option considered for individuals with disabilities and should be the expected outcome of education and publicly-funded services for working-age youth and adults.

As the following excerpt from the bill suggests, the goals and objectives of employment first are complementary to the overarching goals and objectives of the strategic plan:

Sec. 531.02447 (b). The Health and Human Services Commission (HHSC), the Texas Education Agency (TEA), and the Texas Workforce Commission (TWC) shall jointly adopt and implement an employment-first policy in accordance with the state’s policy under Subsection (a). The policy must:

- (1) affirm that an individual with a disability is able to meet the same employment standards as an individual who does not have a disability;
- (2) ensure that all working-age individuals with disabilities, including young adults, are offered factual information regarding employment as an individual with a disability, including the relationship between an individual’s earned income and the individual’s public benefits;
- (3) ensure that individuals with disabilities are given the opportunity to understand and explore options for education or training, including postsecondary, graduate, and postgraduate education, vocational or technical training, or other training, as pathways to employment;
- (4) promote the availability and accessibility of individualized training designed to prepare an individual with a disability for the individual’s preferred employment;
- (5) promote partnerships with employers to overcome barriers to meeting workforce needs with the creative use of technology and innovation;

(6) ensure that the staff of public schools, vocational service programs, and community providers are trained and supported to assist in achieving the goal of competitive employment for all individuals with disabilities; and

(7) ensure that competitive employment, while being the priority and preferred outcome, is not required of an individual with a disability to secure or maintain public benefits for which the individual is otherwise eligible.

The second principle is that as the state workforce development board under the federal Workforce Innovation and Opportunity Act of 2014 (WIOA), the Texas Workforce Investment Council (Council) is in a unique position to facilitate the implementation of the state's employment first policy. TCDD supports those parts of the strategic plan that explicitly speak to the employment needs of people with intellectual and developmental disabilities and encourages further focused acknowledgement of this segment of the workforce.

It should be noted that the collaborative infrastructure for supporting the Texas Workforce System partners currently exists in the statutorily mandated Employment First Task Force, whose members include the Texas Workforce Commission, the Health and Human Services Commission (as well as component members in the Department of Assistive and Rehabilitative Services, the Department of Aging and Disability Services, and the Department of State Health Services), and the Texas Education Agency. The group includes representatives of advocacy and nonprofit organizations with expertise in employment issues affecting people with disabilities.

The Council is encouraged to involve the Employment First Task Force in its activities and efforts related to workforce education, workforce training, and related services, to ensure that the state's employment first policy is an integral part of the rollout of initiatives and partnerships benefitting Texans system wide. Ideally the same abundance of opportunities and benefits that have been designed to assist nondisabled Texans will, with focus and collaboration, become available to disabled Texans as well. Given the long period before the strategic plan is revised (even taking into account the review at the four-year point) as well as the rapidly evolving landscape for jobs in Texas, the Council is urged to consider making relevant adjustments to the plan now. Some suggestions for revisions follow.

Statutory Charge for a Single Texas Workforce System Strategic Plan

Recommendation: On page 6, it would be clarifying to state that consistent with federal and state law, a single plan means that all working-age Texans, regardless of disability status, are included in all aspects of the system strategic plan.

The Workforce System Plan Architecture

Overarching Strategic Imperatives

Recommendation: On page 9, a statement that the strategic imperatives are applicable to all Texans, including veterans, people with disabilities, and other under-represented groups, would help to clarify state policy with respect to inclusion and integration.

Goal Area 1: Focus on Employers

System Objective: Increase business and industry involvement.

On page 21 of the draft plan, it is stated, “Enhanced outreach can attract potential workers from under-represented groups such as veterans and people with disabilities.” The list of related strategies includes “Expand outreach programs to employers to assist veterans to find quality employment” but a corresponding strategy for people with disabilities is not included.

Recommendation: Add an outreach strategy targeted to people with disabilities. In addition to actions like some of those listed in the strategy for veterans, outreach strategies for people with disabilities could include the education of potential employers on issues such as prevention of bullying and protection of rights. By promoting sensitivity to these type of issues, outcomes of employment experiences will be optimized for both the employee and the employer.

In keeping with the impending transfer of vocational rehabilitation from DARS to TWC, the lead Partner Agency would be TWC. As a result of legislation passed in the 84th Session, TWC has also been named the agency responsible for the state use purchasing advisory council and would be able to provide outreach and guidance in that context as well.

Goal Area 2: Engage in Partnerships

System Objective: Expand partnerships with system partners and stakeholder to promote collaboration, joint planning, and enhanced participant outcomes.

Recommendation: The following strategies are particularly apt for the explicit inclusion of people of disabilities:

Improve rehabilitation employment outcomes by establishing additional partnerships with secondary and postsecondary entities and employers.

Create greater access and effective services by promoting collaboration and regional planning.

Goal Area 3: Align System Elements

System Objective: Improve and enhance services, programs, and policies to facilitate effective and efficient transitions.

Recommendation: On page 41, please amend the strategy as follows:

Enhance transition services for students and youth with disabilities to **integrated, competitive** employment or postsecondary education and training then **integrated, competitive** employment.

Recommendation: On the same page, please amend the second performance measure as follows:

- Percent of students and youth with disabilities who participated in transition services and subsequently entered **integrated, competitive** employment.

Goal Area 4: Improve and Integrate Programs

System Objective: Employ enhanced or alternative program and service delivery methods.

Recommendation: On page 47, please amend the second performance measure as follows:

- Total number and percentage of consumers served with intellectual and developmental disabilities, mental health conditions, autism, ~~or and~~ deaf-blindness who subsequently enter **integrated (community), competitive** employment

Measuring Performance—Plan Implementation and System Outcomes

Formal Measures

Recommendation: On page 49, in the second paragraph, please make the following change to the second bullet:

- Entered **integrated, competitive** employment

Thank you for the opportunity to comment on this important plan. We appreciate the inclusion of people with disabilities in all aspects of the system plan for employment in Texas. Please contact me if I can provide additional information or be of other assistance.

Sincerely,

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Texas Council for Developmental Disabilities

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